

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between

**FRATERNAL ORDER OF POLICE,
LODGE #5**

OPINION & AWARD

**AAA No. 01-15-0005-1595
(P/O Lisa Conroy)**

-- and --

CITY OF PHILADELPHIA

ARBITRATOR: James M. Darby, Esq.

APPEARANCES: For the FOP:
Andrew MacDonald, Esq.
Jennings Sigmond, P.C.

For the City:
Benjamin Patchen, Esq.
City Solicitor's Office

This case arose on September 8, 2015, when the City of Philadelphia ("the City") Police Department ("the Department") suspended, and then subsequently terminated, Police Officer Lisa Conroy ("the Grievant") for violating the Department's residency requirement. The Fraternal Order of Police, Lodge #5 ("the Union") filed a grievance alleging that the City's discipline action lacked just cause.

By letter dated December 10, 2015, from the American Arbitration Association (“AAA”), the undersigned was notified of his selection as Arbitrator of this dispute. A hearing was held on November 8, 2016, at the AAA offices in Philadelphia, Pennsylvania, where the parties were afforded a full opportunity to present testimony, exhibits and arguments in support of their positions. The parties presented oral closing arguments in lieu of filing post-hearing briefs, and the record was closed. After fully considering all of the evidence and arguments presented, the matter is now ready for final disposition.

QUESTIONS TO BE RESOLVED

At the hearing, the parties stipulated to the following issue to be resolved by the Arbitrator:

Whether the City had just cause to terminate the Grievant, Lisa Conroy? If not, what shall the remedy be?

APPLICABLE CONTRACT LANGUAGE

XXII. MISCELLANEOUS PROVISIONS

* * *

U. Residency

* * *

- c. All employees will be required to reside in the Commonwealth of Pennsylvania.

(Joint Exhibit 1, p. 87.)

REMEDY REQUESTED

The Union requests that the grievance be sustained, that the Grievant be reinstated and made whole, that his discipline be expunged from his record, and that the Arbitrator retain jurisdiction for purposes of resolving any remedial disputes.

FACTS

The Department hired the Grievant as a police officer in 2006. She was assigned to the 22nd District in 2012. The Grievant was the subject of a previous residency investigation in 2014. During that investigation, it was learned that the Grievant had once owned and subsequently rented property in Philadelphia, but then in 2010 purchased a home in New Jersey (located at [REDACTED], Moorestown). During the 2014 IAB investigation, the Grievant admitted that she was living in New Jersey in violation of the Collective Bargaining Agreement (“the Agreement”) requirement that all employees reside in Pennsylvania.

At a February 2, 2015, residency hearing related to the 2014 IAB investigation, the Grievant represented that she was “now” living with a relative at [REDACTED], Feasterville, Pa. Based on that representation, then-Deputy Police Commissioner Richard Ross decided not to discipline the Grievant, but told her that she would be under surveillance to ensure she complied with the residency requirement in the future. After the Department received a tip that the

Grievant was still living at her New Jersey home, Ross ordered additional surveillance to determine where the Grievant was residing.

Surveillance took place on eight days in February 2015. The Grievant was not seen at the Feasterville location on any of these occasions. On the contrary, she was observed staying at her New Jersey home where her two children (ages 20 and ■■■) reside. While five of these dates (2/15 – 2/17; 2/23 – 2/24) were her scheduled days off, on three of the dates (2/25 - 2/27) she commuted back and forth to work from her New Jersey home. (Joint Exhibit 4.)

Surveillance also took place from March 29 thru April 2. On each of these days the Grievant commuted from her New Jersey home to and from work. She was not observed at the Feasterville location on any of these days. On April 3, 2015, the Internal Affairs Bureau (“IAB”) interviewed the Grievant. She told IAB that she is a single mother and purchased her home in New Jersey so her children could go to school there. The Grievant told IAB she was living in Feasterville with her cousin on her work days, but going to New Jersey on her off days. She also stated that she sleeps in Feasterville on her work days and commutes to work from that location, although she stays in New Jersey during the work week on “rare” occasions. (Joint Exhibit 4.)

The Grievant also told IAB that her cousin owns the Feasterville home and she pays her cousin \$350 per month in cash, but has no lease. She occasionally contributes to pay the utility bills, but her name is not on any of the bills. The

Grievant also informed IAB that her name is on the mortgage and utility bills for the New Jersey home, and she owns no Pennsylvania property. Both of the cars she owns are registered in Pennsylvania, she has a Pennsylvania driver's license, and receives mail at the Feasterville address along with three other individuals and one business.

The IAB investigation concluded that the Grievant's actions violated Section 1-§009-10 of the Department Disciplinary Code (lying during the course of an investigation); Section 1-§021-10 (any conduct "which indicates the employee has little or no regard for his/her responsibility as a member of the Police Department"); and Section 3-§004-10 (failure to comply with the residency requirement). On September 8, 2015, the Grievant chose not to respond to the allegations and was, thereafter, placed on an immediate 30-day suspension with the intent to dismiss. She was dismissed effective October 4, 2015.¹

At the instant hearing, the City through its witnesses (including now-Police Commissioner Ross) presented the foregoing evidence in support of its position that the Grievant resided at the Moorestown, N.J. address in violation of the Agreement. The Grievant testified that she lives at the Feasterville location with her cousin A [REDACTED] H [REDACTED] three days a week, and goes to her New Jersey home

¹ The record shows that numerous attempts to locate the Grievant at the Feasterville residence to serve her with the Notice of Intent to Dismiss and Dismissal Notice were unsuccessful. On two occasions the occupants informed the officers that the Grievant did not live at that location. (Joint Exhibit 4.)

on her two off days to visit her children. She stated she gives her cousin \$200 per week for rent and utility expenses. The Grievant also averred that she files a Pennsylvania income tax return. She added that during the surveillance period she was “basically” in New Jersey on her off days. On cross-examination, the Grievant testified that during the surveillance period her mother “provided care” for her daughters at the New Jersey home, but did not live there. The Grievant currently lives at the New Jersey home.

A [REDACTED] H [REDACTED] testified that the Grievant stayed at her house but did not know how many nights per week. She added that she saw the Grievant “frequently” but did not know the Grievant’s work hours. When asked if the Grievant paid her any rent, H [REDACTED] responded that the Grievant “helps her with bills” but she could not remember how much she received from the Grievant. H [REDACTED] added that “nothing was etched in stone.” She could not recall when or for how long the Grievant lived with her, but that she slept over “a lot.”

DISCUSSION

The parties’ positions can be briefly summarized.

The City maintains that it had just cause to terminate the Grievant for conduct unbecoming, as a result of her violating the residency requirement and then lying about it. It rejects the Union’s contention that a “beyond a reasonable doubt” standard must apply here since such a heightened standard is not set

forth in the Agreement. Nonetheless, the City contends that the record shows the Grievant lived in Moorestown, New Jersey, based on the 12 instances she was seen living there during the investigation and was never observed in Feasterville.

The City submits that this conclusion is also supported by the Grievant owning a home in New Jersey, not Pennsylvania, and no record of her paying a regular rent payment at the Feasterville location. Indeed, H[REDACTED] could provide no specific information as to when or how long the Grievant lived or stayed over at H[REDACTED] home in Feasterville. The City argues that the arbitral precedent relied on by the Union shows that police officers who spent more time at a Pennsylvania residence than the Grievant did here were nonetheless still determined to be out of state residents.

The Union asserts that the City has failed to meet its heavy burden of showing that it had just cause to terminate the Grievant. It submits that the existing arbitral precedent addressing this issue by Arbitrators Thomas McConnell and James Peck, Jr. hold that the City has the burden of showing “beyond a reasonable doubt” that the Grievant was not a resident of Pennsylvania. These cases set forth a number of discreet factors that must be evaluated when determining where an officer resides.

Applying these factors, the Union insists the Grievant is a Pennsylvania residence insofar as she: has a “living arrangement” in Feasterville; pays Pennsylvania income tax; has a Pennsylvania driver’s license; votes in

Pennsylvania; and registers her cars in Pennsylvania. The Union also contends that the Grievant stayed with her cousin in Feasterville, and the lack of a rental agreement was overcome by the testimony showing she stayed there frequently. Additionally, the City could only show eight instances over a three month period during which the Grievant commuted to and from New Jersey. The Union insists that the City needs more evidence than just a few weeks to meet its “beyond a reasonable doubt” burden here.

The undersigned must determine whether the City had just cause to terminate the Grievant for conduct unbecoming when she allegedly violated the residency requirement.

This issue has been addressed in arbitration many times before in this bargaining unit. In analyzing the residency issue Arbitrators McConnell, Peck and Symonette applied a “beyond a reasonable doubt” burden on the City, since police officers can be summarily discharged if found to be in violation of the residency requirement. They also evaluated a number of fact-specific criteria to decipher an officer’s primary residence, including where the officer: 1) rents, leases or owns their primary residence; 2) pays state and local taxes; 3) registers personal property; 4) is licensed to drive; 5) votes; 6) spends the majority of his or her time; 7) registers children for school; and 9) socializes.

Another important factor is whether the officer has previously been warned about being out of compliance with the residency requirement. For example, in *FOP Lodge #5 and City of Philadelphia*, AAA Case No. 01-15-0003-0331 (Peck, J., Arb. 2015) Arbitrator Peck concluded a detective resided in Delaware where the investigation showed: 1) the detective spent most of his time at the property he owned in Delaware, where he also paid the utilities, insurance and property taxes; 2) he only stayed at a Philadelphia address for two days during a one-month period; and 3) his daughter attended school in Delaware. Peck made this determination even though the detective had “paper indicia” of a Pennsylvania residence (i.e., his car was registered in Pennsylvania, he voted and received mail in Pennsylvania, and he had a Pennsylvania driver’s license).

Arbitrator Peck further opined as follows:

Finally, I cannot ignore the fact that Detective Black had been investigated previously by the Internal Affairs Division, and was found at the time to be in violation of the residency requirement in effect at that time. Detective Black was counseled at that time to conform his behavior to the requirements of the City Code. He evidently failed to heed this warning Detective Black was fortunate that the City did not discharge him after the first IAD investigation, and that he was given a second chance.

(AAA Case #0331 at p. 12.)

The facts in the aforementioned *Peck* case are very similar to the facts herein. The Grievant had previously violated the residency requirement. Even though she registered her car in Pennsylvania and had a Pennsylvania’s driver’s license, the Grievant had admitted to living in the home she owned in

Moorestown, New Jersey. Then-Deputy Commissioner Ross told her that she needed to live in Pennsylvania, not at the Moorestown location, and he told her that she would be under surveillance to ensure her compliance. Under these circumstances, the fact that the Grievant continued to maintain a “paper indicia” of residence in Pennsylvania is of no moment. She was required to make Pennsylvania (i.e. Feasterville) her primary residence.

As the detective in the *Peck* case, the Grievant “evidently failed to heed this warning.” The surveillance shows she was using her Moorestown home as her primary residence, both during the work week and on days off. Her children, ages ■ and 20, lived at the N. J. home and attended school in the Moorestown area. The Grievant pays all of the bills, taxes and insurance for the New Jersey home.

Furthermore, other than the Grievant’s and H■■■■ anecdotal, general testimony that the Grievant spent “a lot” of time at the Feasterville location, there is no documentation showing that she paid any rent or utilities at that location. Their testimony regarding how much the Grievant paid in rent vis-à-vis utilities was inconsistent. H■■■■ could not provide any specific information regarding the Grievant’s presence at the Feasterville location, and did not even know her work schedule. Indeed, IAB did not observe the Grievant at the Feasterville location at any time during the random surveillance conducted over a three month time frame.

The Union's contention that the City's surveillance fails to show beyond a reasonable doubt that the Grievant resided in New Jersey cannot be sustained. Had this been the first time the Grievant was investigated for a residency violation, one could argue that all the City proved here was that the Grievant was in New Jersey on 12 occasions. However, the Grievant admitted in her previous investigation that she was living in New Jersey and was directed to comply with the residency requirement (subject to further surveillance) or be subject to termination.

Under these circumstances, once the City showed that **all** of the subsequent surveillance -- without exception -- found the Grievant continuing to live in New Jersey (including days commuting back and forth to work), it was incumbent on her to present reliable and specific evidence demonstrating that she used Feasterville as her primary residence as she had committed to Ross only weeks before. The Grievant failed to present any such evidence. To ask for more surveillance from the City in this case would force it to further utilize its limited resources in a game of "catch me if you can." For these reasons, there is no basis for upending the City's conclusion that the Grievant failed to meet the requirement of establishing a bona fide residence in Feasterville.

Accordingly, based on the totality of all of the foregoing evidence and circumstances, the undersigned concludes that the City had just cause to

terminate the Grievant for violating the residency requirement. The grievance is denied.

Consistent with the foregoing discussion and findings, the Arbitrator renders the following

AWARD

The grievance is denied.

The City had just cause to terminate the Grievant, Lisa Conway.

A handwritten signature in black ink, appearing to read 'James M. Darby', written over a horizontal line.

JAMES M. DARBY
Arbitrator
Lancaster, Pennsylvania
February 2, 2017